HHB-CV-20-6062369-S	**:**	**SUPERIOR COURT**
	:	
SARAH BRAASCH	**:**	**J.D. OF NEW BRITAIN**
	:	**AT NEW BRITAIN**
VS.	**:**	
	:	
FREEDOM OF INFORMATION	**:**	
COMMISSION, et al.	**:**	**July 2, 2021**

BRIEF OF THE DEFENDANT
FREEDOM OF INFORMATION COMMISSION

I. NATURE OF THE PROCEEDINGS

This is an administrative appeal from a decision of the Freedom of Information Commission ("FOIC," or alternatively, the "Commission"). The plaintiff seeks review of the order and final decision in Docket #FIC 2019-0450, Sarah Braasch v. Assistant Chief, Yale University Police Department; and Yale University Police Department, based upon the allegations of error set forth in her appeal, dated October 19, 2020.

II. PROCEDURAL BACKGROUND

By email dated July 27, 2019, the plaintiff filed a complaint with the FOIC, alleging that the defendants Assistant Chief and Yale University Police Department (together hereinafter "YPD") violated the Freedom of Information Act by failing to comply with her request for a copy of certain body-worn camera footage. (R. 1). On August 2, 2019, the Commission docketed the plaintiff's complaint, assigning it Docket #FIC 2019-0450, Sarah Braasch v. Assistant Chief, Yale University Police Department; and Yale University Police Department, (R. 1). The Commission held a contested case hearing on November 4, 2019. (R. 22). The hearing officer issued a report dated August 18, 2020 (R. 260), which was considered and adopted by the

Commission at its September 9, 2020 regular meeting. (R. 269). It is from the FOIC's Final Decision that the plaintiff appealed to this Court.

III. STATEMENT OF RELEVANT FACTS

The records at issue in this appeal are body-worn camera video recordings created by YPD of interviews with the plaintiff during the investigation of an incident involving the plaintiff when she was a graduate student at Yale University ("Yale") and a resident of the Hall of Graduate Studies on the Yale campus. (R. 47-48). The following facts are uncontroverted: At approximately 1:40 a.m., on May 8, 2018, the plaintiff called YPD dispatch, identified herself as a student and resident of the Hall of Graduate Studies, and alleged that a woman, who was "a complete stranger" to her, was sleeping in a common room in her residence hall, on the 12th floor. (R. 65-66, 95). She made it clear to the dispatcher that she had never seen the sleeping woman before; that she had no idea who she was; and that the sleeping woman should not be there. (R. 58-59, 65-66). She also told YPD that the sleeping woman was in the common room to harass her. (R. 63, 80, 82). The plaintiff's call to YPD came approximately two weeks after YPD responded to a call about an unknown person in a student housing area, who turned out to be an armed intruder. (R. 88-89). Thus, upon receipt of the plaintiff's call, several YPD officers were dispatched to the Hall of Graduate Studies to investigate potential criminal activity, arriving within minutes of the call. (R. 80, 96, 150).

Upon their arrival at the scene, the YPD officers separately interviewed the plaintiff and the woman who had been sleeping and recorded the interviews on their body-worn cameras. (R. 156-157). During the interviews, the plaintiff reiterated her allegations of trespass and harassment. (R. 152, 156-157). However, YPD's investigation revealed that the sleeping woman was not trespassing, but rather, was a Yale student who also was a resident of the Hall of

Graduate Studies who had apparently been in the common room studying before falling asleep. (R, 152, 156-157). YPD further determined, through its investigation, that the sleeping woman had not harassed the plaintiff. (R. 99, 152, 156-157). YPD documented its investigation of a "suspicious person/activity" in an Incident/Investigation Report, dated May 8, 2018, and referred the matter to Yale to investigate whether the plaintiff's conduct that night violated any university policies. (R. 150-158). YPD offered the plaintiff the opportunity to review the videos in the presence of a YPD officer, which opportunity was refused, and she also was provided a copy of the YPD incident report. (R. 114).

On May 23, 2019, the plaintiff requested from YPD a copy of body-worn camera footage of herself recorded on May 8, 2018 ("videos"). (R. 161). The same day, YPD acknowledged receipt of the request. (R. 160). On July 7, 2019, the plaintiff contacted YPD via email and renewed her request for the videos. (R. 160). On July 9, 2019, YPD denied the plaintiff's request on the ground that the videos were "created in connection with an uncorroborated allegation of a crime." (R. 159). On July 27, 2019, the complainant filed a complaint with the FOIC. (R. 1). At the contested case hearing in this matter, YPD again claimed that the requested records contained uncorroborated allegations and were exempt from disclosure pursuant to Conn. Gen. Stat. §1-210(b)(3)(H). The hearing officer ordered YPD to submit the records they claimed were exempt from disclosure to the Commission for in camera inspection, and YPD subsequently submitted three video recordings on a thumb drive to the Commission for its review. (R. 189).

IV. STANDARD OF REVIEW

Under Conn. Gen. Stat. §1-206(d), appeals from decisions of the Commission must

be brought by aggrieved parties in accordance with the Uniform Administrative Procedure Act (hereinafter "UAPA"), as codified in Chapter 54 of the General Statutes, particularly §4-183(j), which provides that:

> [t]he [reviewing] court shall not substitute its judgment for that of the agency as to the weight of evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) in violation of constitutional or statutory provision; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In addition, Conn. Gen. Stat. §4-183(i) requires that the appeal be confined to the record unless there are alleged irregularities in procedure not shown in the record.

"Judicial review of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable….[I]t imposes an important limitation on the power of the courts to overturn a decision of an administrative agency…and [provides] a more restrictive standard of review than standards embodying review of weight of the evidence or clearly erroneous actions…." FairwindCT, Inc. v. Connecticut Siting Council, 313 Conn. 669, 689 (2014), citing Sweetman v. State Elections Enforcement Commission, 249 Conn. 296, 331-32 (1999). Thus, a reviewing court is required to defer to the subordinate facts found by the Commission, if there is substantial evidence to support those findings. Dufraine v. Commission on Human Rights & Opportunities, 236 Conn. 250, 259, 673 A.2d 101 (1996); Newtown v. Keeney, 234 Conn. 312, 319-20, 661 A.2d 589 (1995).

The reviewing court should not retry the case and should uphold the agency's decision if reasonably supported by the evidence that was heard. Caldor Inc. v. Mary M. Heslin, Commissioner of Consumer Protection, 215 Conn. 590, 596 (1990); cert. denied, 498 U.S. 1088 (1991); Madow v. Muzio, 176 Conn. 374, 376 (1978); C&H Enterprises, Inc. v. Commissioner of Motor Vehicles, 176 Conn. 11, 12-13 (1978); Williams v. Liquor Control Commission, 175 Conn. 409, 414 (1978). The question to be answered by a reviewing court is not whether the court would have reached the same conclusion, but whether the record before the administrative agency supports the action taken. Hospital of St. Raphael v. Commission on Hospitals and Health Care, 182 Conn. 314, 318 (1980). In discussing the "substantial evidence" standard, our Supreme Court stated that: "evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred…the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Christopher R. v. Commissioner of Mental Retardation, 277 Conn. 594, 611-612 (2006) (internal quotation marks omitted).

Indeed, the Supreme Court has stated:

> [e]ven as to questions of law, "[t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion ….

Perkins v. Freedom of Information Commission, 228 Conn. 158, 164-165 (1993) ("Perkins") (emphasis in original). Specifically concerning questions of law, the Connecticut Supreme Court has long held that, when reviewing agency decisions, the courts should "accord great deference to the construction given [a] statute by the agency charged with its enforcement." Perkins, at 165; see Ottochian v. Freedom of Information Commission, 221 Conn. 393, 397 (1992); Board

of Trustees of Woodstock Academy v. Freedom of Information Commission, 181 Conn. 544, 552 (1980) ("Woodstock Academy"); Anderson v. Ludgin, 175 Conn. 545, 555 (1978); Corey v. Avco-Lycoming Division, 163 Conn. 309, 326 (1972); Clark v. Town Council, 145 Conn. 476, 485 (1958); Downer v. Liquor Control Commission, 134 Conn. 555, 561 (1948). In fact, the practical interpretation of legislative acts by governmental agencies responsible for their administration is not only a "recognized aid to statutory construction," Local 1186 v. Board of Education, 182 Conn. 93, 105 (1980); Jones v. Civil Service Commission, 175 Conn. 504, 508 (1978), it is also "high evidence of what the law is." Woodstock Academy, 181 Conn. at 552.

While pure questions of law do invoke a broader standard of review, State Board of Mediation and Arbitration v. FOIC, 244 Conn. 487, 493-494 (1998); Connecticut Light & Power Co. v. Texas-Ohio Power, Inc., 243 Conn. 635, 642-644 (1998), where a statutory provision is subject to more than one plausible construction, the one favored by the agency charged with enforcing the statute will be given deference. Bridgeport Hospital v. Commission on Human Rights & Opportunities, 232 Conn. 91, 110 (1995); Starr v. Commissioner of Environmental Protection, 226 Conn. 358, 376 (1993). An agency's interpretation of a statute deserves deference when that interpretation previously has been subjected to judicial scrutiny. Board of Selectmen v. Freedom of Information Commission, 294 Conn 294, 438 (2010); Longley v. State Employees Retirement Commission, 284 Conn. 149, 166 (2006).

Under this scope of judicial review, the FOIC's decision should be sustained because the facts found are reasonably supported by the record, the FOIC has correctly applied the law to those facts, and the FOIC has not violated any of the standards set forth in Conn. Gen. Stat. §4-183(j).

V. ARGUMENT

THE FOIC CORRECTLY CONCLUDED THAT THE RECORDS AT ISSUE ARE EXEMPT FROM DISCLOSURE PURSUANT TO CONN. GEN. STAT. §1-210(b)(3)(H).

A. Applicable Law

Conn. Gen. Stat. §1-210(b)(3)(H) provides that disclosure is not required of:

> [r]ecords of law enforcement agencies not otherwise available to the public which records were compiled in connection with the detection or investigation of crime, if the disclosure of such records would not be in the public interest because it would result in the disclosure of…(H) uncorroborated allegations subject to destruction pursuant to section 1-216.

Conn. Gen. Stat. §1-216 provides:

> [e]xcept for records the retention of which is otherwise controlled by law or regulation, records of law enforcement agencies consisting of uncorroborated allegations that an individual has engaged in criminal activity shall be reviewed by the law enforcement agency one year after the creation of such records. If the existence of the alleged criminal activity cannot be corroborated within ninety days of the commencement of such review, the law enforcement agency shall destroy such records.

The FOIC correctly determined that the videos at issue in this case met each element of the exemption. The plaintiff does not dispute the Commission's findings that the videos are records of a law enforcement agency that are not otherwise available to the public, or that the records were subject to destruction pursuant to Conn. Gen. Stat. §1-216, but argues on appeal that the videos were not created in connection with the detection or investigation or crime, and that they do not contain "uncorroborated allegations". The plaintiff further argues that the FOIC erred: when it did not find that YPD violated the equal protection clause of the federal and state constitution by sharing the videos with Yale; when it did not find that YPD waived its right to

claim an exemption for the videos; and by failing to order YPD to provide a redacted copy of the videos to her. None of the plaintiff's arguments have merit.

B. The FOIC correctly determined that the records at issue were created "in connection with the detection or investigation of crime".

The plaintiff argues that the videos at issue were not created in connection with the detection or investigation of crime because the plaintiff "did not call YPD to report a crime" (Pl. Br. 8), she did not intend for the sleeping student to be arrested (R. 55, 58, 83), and because her allegations "were not criminal in nature" (Pl. Br. 9).

When the plaintiff called YPD, at 1:40 a.m., and described to the dispatcher what was transpiring, i.e., that that there was a sleeping stranger, whom she had never seen before, sleeping in the common room on the 12th floor of her dormitory, YPD dispatched officers to investigate a potential trespass, just as it had done two weeks earlier when it received a similar call from a student about a stranger in a dormitory, who turned out to be an armed intruder. When officers arrived in response to the plaintiff's call, the plaintiff also told them that the stranger was there to harass her. After investigation of these allegations, YPD determined that there was no trespass and no harassment.

It is true that when the plaintiff called YPD, she did not use the words "I'm calling to report a trespass", or, "I'm calling to report criminal harassment". And she may not have intended by her call for someone to be arrested. However, as the chief of YPD testified, "[m]ost citizens who contact the police department don't quote [the] Connecticut General Statutes in defining the behavior they're calling on. They contact the police to describe the behavior and the police have to make an assessment to determine where, what type of crime they're investigating." (R. 121). It seems obvious that law enforcement agency personnel must rely on,

and be guided by, their own training, experience and judgment when deciding how to characterize or dispatch a call, not by the wishes or intentions of the caller, and the court has so held. See Bona v. Freedom of Information Comm'n, Docket No. CV-94-0123208-S, 1995 WL 491386 at *13 (August 10, 1995), aff'd, 44 Conn. App. 622 (1997) ("the wishes of an alleged victim…are not controlling with respect to the actions to be taken by the police"). In the instant case, the chief of YPD testified that the plaintiff's allegations were treated as potentially criminal, and that it would have been "unconscionable for a police department…not to try to make a determination as to whether or not there was some criminal activity". (R. 120). The plaintiff, however, would have the Commission discount the unrefuted testimony of the chief. Moreover, although the plaintiff argues that it was unreasonable for YPD to treat the investigation of the plaintiff's call as potentially criminal, as the finder of fact, the Commission was entitled to credit the chief's testimony regarding how YPD characterized the nature of the investigation. Based on the substantial evidence in the record, the FOIC correctly found that the videos at issue were created in connection with YPD's detection or investigation of crime.

C. The FOIC correctly determined that the allegations in the videos were uncorroborated.

The Commission has interpreted the term "corroborate" as "to strengthen, to add weight or credibility to a thing by additional and confirming facts or evidence"; "to state facts tending to produce confidence in the truth of a statement made by another"; "to give increased support to"; "make more sure or evident". See e.g., Rachel Gottlieb and the Hartford Courant v. State of Connecticut, Department of Public Safety, Docket #FIC 94-291 (May 24, 1995). After careful in camera inspection of the videos at issue, the hearing officer found that such records contained uncorroborated allegations of trespass and harassment. The plaintiff argues, however, that the exemption does not apply because "the facts are corroborated". According to the plaintiff,

because the underlying facts surrounding the incident are undisputed, the allegations are not uncorroborated. This argument, which focuses on the facts rather than the allegations, is based on an obvious misreading of the statute. The plaintiff does not argue, nor can she, that the allegations of trespass or harassment were corroborated, because they were not. Therefore, the Commission's finding that the allegations were uncorroborated was proper.

D. The Plaintiff's constitutional arguments were not considered by the Commission and therefore should not be addressed by this court.

The plaintiff also argues, in her brief, that the Commission erred by not concluding that YPD violated her constitutional rights when it shared the videos with Yale in connection with a referral for possible disciplinary action against her. The hearing officer declined to consider this argument, noting that the Commission lacked jurisdiction to decide constitutional claims. Despite acknowledging in her brief that the Commission lacks jurisdiction to decide constitutional questions, the plaintiff again argues that Yale violated her constitutional rights and that the FOIC "has an obligation itself to not suborn a denial of equal protection".[1] (Pl. Br. 12). Not surprisingly, the plaintiff does not even attempt to explain to this court how the adjudication of constitutional claims falls within the Commission's narrow jurisdiction, because it clearly does not. Because the Commission did not address the plaintiff's constitutional claims, and because the plaintiff has not demonstrated that the Commission erred in declining to do so, the court should not consider such claims on appeal.

E. The Plaintiff's claim that the Commission should have ordered disclosure of a copy of the videos because

[1] The definition of "suborn" in the Merriam-Webster dictionary is "to induce secretly to do an unlawful thing; to induce to commit perjury; to obtain (perjured testimony) from a witness." See https://www.merriam-webster.com/dictionary/suborn. It is unclear how the plaintiff intended the use of this word in the context of her argument, but the FOIC takes exception to any suggestion that the FOIC induced, secretly or otherwise, YPD or anyone, to commit an unlawful act.

YPD allowed her to view the video, has no basis in the law.

The plaintiff argues that "the FOIC has capriciously and unreasonably suborned[2] selective disclosures by determining that [YPD] could offer [her] a chance to review the videos, but not permit her to retain a copy." (Pl. Br. 14). First, there was no selective disclosure in this case. As the chief testified, the videos and the police report in this case were part of the plaintiff's student record under the Family Educational Rights and Privacy Act ("FERPA"), 12 U.S.C. §1232g, (R. 116), and were provided to a dean at Yale to determine whether the plaintiff's actions that night warranted disciplinary action against her. (R. 114). FERPA both prohibited the dean from further disclosing the records and required that the plaintiff be permitted to view them. See 34 C.F.R. §99.10(a). Providing the records to Yale pursuant to FERPA is simply not a "disclosure" by YPD under the FOI Act.

But even if there had been a "selective disclosure", a public agency does not waive its right to claim an exemption under the FOI Act by virtue of a prior disclosure. See e.g., Goshdigian v. Town of West Hartford, Docket #FIC 2005-112 (September 14, 2005); General Electric Company v. State of Connecticut, Office of the Attorney General, and State of Connecticut, Department of Environmental Protection, Docket #FIC 1998-089 (April 28,1998); Ryffel v. Town of Fairfield, Docket #FIC 88-83 (June 8, 1988). Accordingly, the plaintiff's claim of error is without merit.

F. The Commission did not err when it allowed YPD to withhold the entirety of the videos, rather than requiring disclosure of a redacted copy.

[2] Again, the plaintiff's use of the term "suborned" in the context of her argument is unclear, but the FOIC takes exception to any suggestion that the FOIC induced, secretly or otherwise, YPD or anyone, to commit an unlawful act.

In her brief, the plaintiff argues that the Commission erred in not ordering disclosure of a redacted copy of the videos. (Pl. Br. 15). In Bona, the Appellate Court upheld the trial court's decision that the entirety of a police incident report containing uncorroborated allegations of criminal activity need not be disclosed. Bona, 44 Conn. App. at 628, 641. As it must, the FOIC has followed that decision since, and allowed the withholding of an entire record containing uncorroborated allegations, see e.g., Terrance Burton v. James Rovella, Commissioner, State of Connecticut, Department of Emergency Services and Public Protection, Docket #FIC 2020-0161 (February 24, 2021); David Golodner v. Chief, Police Department, City of New London, Docket #FIC 2014-815 (July 22, 2015); Loretta Davis and Keyonna Davis v. Commisisoner, State of Connecticut, Department of Emergency Services and Public Protection, Docket #FIC 2013-540 (June 11, 2014); Gerald Pinto v. Chief, Police Department, Town of Stratford, Docket #FIC 2013-071 (August 14, 2013); Douglas O'Meara v. Legal Affairs Unit, State of Connecticut, Department of Public Safety, Docket #FIC 2009-782 (October 27, 2010); Karen Otto v. Chief, Police Department, Town of Greenwich, Docket #FIC 2006-049 (January 10, 2007); Peter Bosco v. Chief, Police Department, Town of Wethersfield, Docket #FIC 2005-031(November 9, 2005); Richard Kosinski v. Department of Public Safety, Docket #FIC 2003-462 (September 22, 2004); Martin Chalecki v. Department of Public Safety, Docket #FIC 2003-218 (February 25, 2004); Gregory C. Damato v. Records Supervisor, Police Department, Town of Glastonbury, Docket #FIC 2000-291 (August 9, 2000); Edward Peruta v. Chief, Police Department, Town of Wethersfield, Docket #FIC 1999-493 (May 24, 2000); David Owens and the Hartford Courant v. Chief, Police Department, City of Torrington, Docket #FIC 1999-296 (December 22, 1999). Although the plaintiff argues that the FOIC misinterpreted the Court's ruling in Bona, such argument is dubious in view of the fact that in the 25 years since that decision, the legislature has

taken no action to legislatively overturn Bona or the Commission's interpretation of it. Moreover, it simply makes sense that a public agency should be allowed to withhold an entire record containing uncorroborated allegations, in light of the public policy underlying the exemption. As then state Senator Richard Blumenthal stated during the debate on Public Act 90-335, now codified at Conn. Gen. Stat. §1-210(b)(3)(H), "the purpose really is to provide some protection for individuals who may be the subject of these kinds of allegations and who deserve some protection against disclosure under FOIA." Bona, 44 Conn. App. at 631, n. 10. Disclosure of even a redacted record containing uncorroborated allegations could reveal the identity of the person who was the subject of uncorroborated allegations, thereby undermining the purpose of the exemption. Thus, the Commission did not err in allowing YPD to withhold the entirety of the videos containing uncorroborated allegations.

VI. CONCLUSION

In its final decision, the Commission correctly concluded that the records at issue are exempt pursuant to §1-210(b)(3)(H), G.S., and that YPD did not violate the FOI Act. The Commission's determination that the records are exempt from disclosure is based on substantial evidence in the administrative record and demonstrates a correct application of the law to the facts. In light of the evidence, the Commission has not acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. Therefore, the plaintiff's appeal should be dismissed, and the Commission's decision affirmed.

DEFENDANT
FREEDOM OF INFORMATION COMMISSION

By /s/ *Kathleen K. Ross*

Kathleen K. Ross
Commission Counsel
165 Capitol Ave, Suite 1100
Hartford, CT 06106
Phone No. (860) 566-5682
Juris No. 060939

CERTIFICATION OF SERVICE

I hereby certify that a copy of this Brief was sent via electronic mail, to the following parties of record this 2nd day of July 2021:

Jay M. Wolman
Randazza Legal Group, PLLC
100 Pearl Street, 14th Floor
Hartford, CT 06103
jmw@randazza.com

Marc J. Randazza (admitted pro hac vice)
Randazza Legal Group, PLLC
30 Western Avenue, Harbor Room
Gloucester, MA 01930
mjr@randazza.com

Aaron S. Bayer
Wiggin & Dana, LLP
PO Box 1832
New Haven, CT 06508
abayer@wiggin.com

/s/ *Kathleen K. Ross*
Kathleen K. Ross